(1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

Beverly Brophy,

Petitioner

v.

Unemployment Compensation Board of Review,

Respondent

On Petition for Writ of Certiorari
To The Supreme Court of Pennsylvania, Middle District

PETITION FOR WRIT OF CERTIORARI

Samuel S. Kantz, Esquire
Counsel of Record
3015 Wilmington Road
New Castle, PA 16105
(724) 658-2313

Daniel I. Herman, Esquire
Of Counsel
Geer and Herman, P.C.
2100 Wilmington Road
New Castle, PA 16105
(724) 652-0511

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36 pp

Question Presented for Review:

Whether 43 P.S. Section 753(4)(i)(4)(5) is unconstitutional in that it violates the Fourteenth Amendment of the United States Constitution and Article 1 of the Constitution of the Commonwealth of Pennsylvania because the law fails the so-called "rational relationship" test as it is arbitrary and capricious.

The law unfairly limits a parent's entitlement to unemployment benefits.

Parties to the proceeding:

1. **Plaintiff**
   Beverly Brophy
   R.D. #5, Box 299
   New Castle, Pennsylvania 16105

2. **Respondent**
   Commonwealth of Pennsylvania
   Department of Labor and Industry
   Unemployment Compensation Board of Review
   10th Floor, Labor and Industry Building
   Seventh and Forster Streets
   Harrisburg, Pennsylvania 17121

BASIS FOR JURISDICTION PURSUANT TO SUPREME COURT RULE 14

This Writ requests that an Order of the Pennsylvania Supreme Court, the highest state court, be reviewed. The judgment sought to be reviewed was entered on September 24, 2002. There is no Order regarding rehearing nor any Order granting an extension of time to file the Writ of Certiorari. Said Order is included in the Appendix submitted herewith.

This Honorable United States Supreme Court has jurisdiction to entertain Writ of Certiorari in the instant matter because the Order in question violates the Fourteenth Amendment of the United States Constitution and the First Article of the Constitution of the Commonwealth of Pennsylvania. The Judgement sought to be reviewed was issued by the highest Court in Pennsylvania and is a final, appealable Order.

No notification is required by Rule 29.4 in this matter, as an agency of the Commonwealth of Pennsylvania is a party to these proceedings.

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TABLE OF AUTHORITIES

43 P.S. Section 753 (4)(i)(4)(5) – Pennsylvania Unemployment Insurance Law

43 P.S. Section 752, Declaration of Public Policy – Pennsylvania Unemployment Insurance Law

Article 18, Section 511(7) – New York Unemployment Insurance Law

Pa.R.C.P. 1910.16, et seq.

Bievenour v. Unemployment Compensation Board of Review, 401 A.2d 594 (1979)

Kroh v. Unemployment Compensation Board of Review, 711 A.2d 1093 (1998)

Lende v. Lende Construction Company and Minnesota Workers' Compensation Assigned Risk Plan, 417 N.W.2d 633, (1988)

Martin v. Unemployment Compensation Board of Review, 466 A.2d 107 (9183)

Rosler vs. Commonwealth Unemployment Board of Review, 552 A.2d 62 (1979)

PETITION

FACTS

Beverly A. Brophy (Claimant) filed an Application for Unemployment Compensation Benefits with a base year consisting of the four calendar quarters of 2000. During the first half of that period, Claimant worked for Liberty Mutual Insurance Company and earned wages which were included in her base year. During the last half of 2000, Claimant worked for Frengel Painting, a sole proprietorship, owned by her son. All wages earned by the Claimant during the last half (last 2 quarters) of 2000 were not included by the Unemployment Referee in the calculations for determining whether Brophy qualified for unemployment benefits. The wages earned during her employment for her son were disallowed because they represented earnings from employment for her son that is specifically excluded under Pennsylvania Law, 43 P.S. Section 753 (4)(l)(4)(5). The Referee ruled that Claimant was ineligible for unemployment benefits because the total wages earned in the year 2000 fell short of the total qualifying base year wage requirement of $16,880.00. The Referee then considered Claimant's eligibility under an additional Section of Pennsylvania Unemployment Law and she was disqualified under that Section as well because she did not meet the total base year wages of $16,762.00. The Referee found that she was financially ineligible for unemployment benefits because the wages Claimant earned while employed by

her son were excluded by State Statute, which is the subject of this Writ.

Claimant appealed the Referee's Decision to the Unemployment Compensation Board of Review. The Board of Review affirmed the Referee's Decision. Claimant further appealed to the Commonwealth Court of Pennsylvania. The Commonwealth Court affirmed the Decision of the Unemployment Compensation Board of Review. Claimant then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was summarily denied with a one sentence Decision. All of the Decisions aforementioned are included in the Appendix submitted herewith.

Claimant is now seeking review by the United States Supreme Court. Claimant respectfully submits this Writ of Certiorari requesting that the United States Supreme Court accept this case and issue a ruling that Pennsylvania Unemployment Compensation Law Section 43 P.S. Section 753 (4) (l)(4)(5) is unconstitutional because it is not rationally related to a legitimate state interest and because it is arbitrary and capricious in it's applicaton.

Section 4(l)(4)(5), the Section in question, provides that the "word "employment" shall not include – service performed by an individual in the employ of her son, daughter, or spouse, and service performed by a child under the age of eighteen (18) in the employ of his father or mother". Claimant is challenging the constitutionality of said Section.

ARGUMENT

Section 4(*l*)(4)(5) of the Unemployment Compensation Law violates the Pennsylvania Constitution and the United States Constitution in that it is arbitrary and capricious in it's application.

The Section in question excludes from the definition of employment "service performed by an individual in the employ of his son, daughter or spouse". That means that under the law no immediate family member who works in a family business and who in fact pays unemployment insurance premiums may ever collect unemployment benefits.

It is well settled that the Standard of Review in determining the constitutionality in cases where no suspect class is involved is a rational relationship test. The inquiry is whether the statute in question bears a rational relationship to a legitimate governmental interst. "Legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." See, *Martin v. Unemployment Compensation Board of Review*, 466 A.2d 107 (1983). When evaluating constitutionality of statutes the Courts must give great leeway to legislatures. Under Pennsylvania Law, the legal standard is one of reasonableness. See, e.g., *Kroh v. Unemployment Compensation Board of Review*, 711 A.2d 1093 (1998).

The constitutionality of the Statute in question was determined by the Commonwealth Court of Pennsylvania in *Bievenour v. Unemployment Compensation Board of Review*, 401 A.2d 594, (Pa.Commw., 1979). The *Bievenour* court held that the Statute in question is constitutional. However, the instant case is clearly distinguishable from the *Bievenour* case. The *Bievenour* case was decided 23 years ago, and the *Bievenour* Court did not consider whether the statute was arbitrary in its application. In the *Bievenour* case the Claimant and his employer, his father, did not have a formal work arrangement. The parties did not have formal wage records or a formal work relationship. In *Bievenour*, the referee found that the Claimant is

> 69 years old and had worked sporadically at odd jobs for his son whenever the son "had money to go ahead on a project". Thus, the computation of benefits without a formal arrangement, combined with the great potential for fraudulent abuse, presents obvious problems. The varying number of weekly working hours and pay scale differences in many job positions makes benefit computation difficult if not impossible. The acknowledged purpose of the Act is to provide temporary assistance to relieve economic hardship of sudden unemployment, and is not and

> cannot be a social welfare program for the elderly. *Bievenour* at 691-620.

The Commonwealth Court in the instant case failed to acknowledge that the facts in the instant case are completely distinguishable from the facts in the *Bievenour* case. Here the Claimant had a formal work relationship. All parties acknowledge and the Referee never questioned if the Claimant in fact was committing a fraud when she worked for her son. To the contrary, all parties acknowledge that the Claimant was a bonafide employee and necessary employee of her son's business. She performed necessary services in a legitimate business. Further she was paid and compensated for those services and appropriate unemployment insurance premiums were paid into the system. Actual employment records were kept in the normal course of business. The records were kept with regularity and particularity and indicated the formality of the employment relationship in this case. The Commonwealth Court failed to acknowledge the extreme factual differences between the *Bievenour* case and the instant.

Further, the *Bievenour* Court failed to analyze whether the statute in question is arbitrary in its application. This Statute may be easily thwarted leading to unfair and arbitrary application of this law. The intent of this Statute is to "prevent fraud and fraudulent claims for unemployment compensation". However, an unscrupulous claimant could easily thwart the Statute by merely

incorporating the family business. Had the Claimant herein been employed by a closely held Corporation, all the wages that she earned during the second quarters of the year 2000 would have been included in computing her base eligibility salary and she would have then been deemed to be eligible to receive unemployment benefits. Where the Legislative scheme is easily thwarted, the Legislative scheme is NOT rationally related to the governmental purpose and must be struck down.

While the State has an interest in preventing fraudulent unemployment claims, the State also has a legitimate interest in providing economic security to citizens who have become unemployed through no fault of their own. *Rosler v. Commonwealth Unemployment Board of Review*, 552 A.2d 62 (1979). The compelling public policy which motivated the Legislature to enact the unemployment compensation law and structure is also important to evaluate. The public policy underlying this particular Statute is consistent with the Act's original enactment in 1936. "Unemployment, resulting in indigency, falls with crushing force upon the unemployed worker" and the concern for the impact of unemployment and indigency upon the body politic through the cost of welfare was the motivating force for the Legislature to enact an unemployment safety net. The Legislature determined that the setting aside of money in a reserved fund for distribution to eligible employed Pennsylvanians was the best way to offset the negative impact of unemployment

upon the Commonwealth and its people. 43 P.S. Section 752, Declaration of Public Policy.

The fact that a bonafide employee in a family business can be denied unemployment benefits is contrary to the public policy of the State of Pennsylvania. This is true especially in this time of economic downturn and when family values and family businesses should be supported by governmental safeguards. This holding is inconsistent with public policy.

Subsection (4)(i)(4)(5) of the Law implies the assumption of the existence of a kind of defacto fraud when a mother works for her child in his business. Surely this can not be correct. Can the Legislature be permitted to create a class of people, parents, who are presumed to be undeserving of benefits merely because of their status as parents working for this children? As stated above, Appellant's work history and wages from Liberty Mutual, a previous employer, were accepted without question. Similarly Claimants work history and wages from Frengel were accepted without question. No one questioned whether Appellant was actually committing a fraud. In this particular case it is clear that Claimant is not committing a fraud.

An argument put forth by the Commonwealth herein is that the State Statute is necessary to keep the costs of administering the unemployment insurance program in this State to a minimum. However, this Statute does not save any money for the State due to fraudulent claims. There is already a system in place including unemployment hearing officers

(Referees) whose job it is to hear the facts of unemployment benefit applications. Any allegation of fraud can be weeded out at the hearing level.

Claimant is entitled to other benefits of employment such as Federal Benefits, Social Security Benefits, Insurance Coverage if offered by the employer and all of the other rights and privileges afforded to working people. She is not however in Pennsylvania, entitled to have those wages considered in the base year calculation for unemployment.

Other States have gotten it right even though Pennsylvania has missed the mark. New York, for example, has recognized that family employment is the backbone of a healthy economy. Article 18 Section 511(7) of the New York Unemployment Insurance Law provides, "The term "employment" does not include service for an employer by his spouse or child under the age of 21". The New York law makes parents working for adult children and adult children working for parents eligible for the protection of unemployment insurance in the State of New York. Does the State of New York have less of an interest in preventing fraud than the State of Pennsylvania?

Similarly, the State of Minnesota has found an easy and fair way to avoid any fraud and collusion by unscrupulous parties while still affording an entitlement to bonafide workers. Although this example is a Workers' Compensation law and not an unemployment law, the reasoning is analogous to the instant

case. The Minnesota Workers' Compensation Law provides an option to employers specifically in family partnerships, small proprietors and closely held corporations whereby the employer and employee may opt in and elect workers' compensation coverage for family members by disclosing the relationship up front and applying for such option. See, *Janelle S. Lende, Realtor v. Lende Construction Company and Minnesota Workers' Compensation Assigned Risk Plan*, 417 N.W.2d 633, (1988).

The arbitrariness of Pennsylvania's exclusion for a working parent is further illustrated by the fact that the wages earned by the parent are eligible under Pennsylvania Law for many other purposes. For example, had the parent employee been liable for any spousal or child support, all of the wages earned would be included in determining the amount of spousal or child support. See Pa.R.C.P. 1910.16 et seq. Similarly all wages earned are subject to Federal Income Tax and State Income Tax. It is clear that a parent employee has all of the obligations, responsibilities and limitations that all other workers have, without any of the protections and entitlements that the rest of the work force has.

The arbitrariness of this Statute is the ease with which this Statute can be thwarted. As mentioned above all an unscrupulous relative employer would have to do is to incorporate his small business. A closely held Corporation or a closely held Limited Liability

Company does not have the same limitation under Pennsylvania Law. The ease with which this Legislative Enactment may be thwarted causes an arbitrary and capricious application of this Law, and renders the statute **NOT** rationally related to a legitimate governmental purpose.

CONCLUSION

Section (4)(i)(4)(5) of the Law violates Claimant's rights under both the United States and Pennsylvania Constitutions. Claimant is subjected to an arbitrary law that unfairly disqualified her from receiving an entitlement which other similarly situated individuals in this state would have received. The stated "rational relationship" to a State purpose is not strong enough to overcome the clear showing of arbitrariness established by the Claimant.

It is respectfully requested that this Honorable Court accept this Writ of Certiorari and accept this case for Appeal.

Respectfully submitted,
Samuel S. Kautz Counsel of Record
GEER AND HERMAN, P.C.

By: _____

Daniel I. Herman, Esquire
2100 Wilmington Road
New Castle, PA 16105
(724) 652-0511

Supreme Court No.: 38960

In The

Supreme Court of the United States

Beverly Brophy,

Petitioner

v.

Unemployment Compensation Board of Review,

Respondent

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To The Supreme Court of Pennsylvania, Middle District

APPENDIX

Samuel S. Kantz, Esquire
Counsel of Record
3015 Wilmington Road
New Castle, PA 16105
(724) 658-2313

Daniel I. Herman, Esquire
Of Counsel
Geer and Herman, P.C.
2100 Wilmington Road
New Castle, PA 16105
(724) 652-0511

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BEVERLY A. BROPHY,	:	No. 239 MAL 2002
	:	
Petitioner	:	
	:	Petition for
v.	:	Allowance of
	:	Appeal from Order
UNEMPLOYMENT	:	of the Common-
COMPENSATION	:	wealth Court
BOARD OF REVIEW,	:	
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 24th day of September, 2002, the Petition for Allowance of Appeal is denied.

TRUE & CORRECT COPY

Attest: Sep 25, 2002

S/_____
Shirley J. Phipps
Appellate Clerk

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Beverly A. Brophy, Petitioner	:	
v.	:	No. 2212 C.D. 2001
Unemployment Compensation Board of Review, Respondent	:	Submitted: December 28, 2001

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge[1]
HONORABLE JESS S. JIULIANTE, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNE

FILED: March 8, 2002

Beverly A. Brophy appeals from the order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the Unemployment Compensation Referee finding Brophy ineligible for benefits pursuant to Sections 401 and 404 of the Pennsylvania Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, *as amended*, 43 P.S. §801, 804 and also

[1] This case was assigned to the opinion writer prior to the date when Judge Kelley assumed that status of senior judge on January 1, 2002.

that denied her challenge to the constitutionality of Section 4(l)(4)(5) of the Law, 43 P.S. §753(l)(4)(5). Brophy contends that Section 4(l)(4)(5) is unconstitutional inasmuch as no rational basis exists for disqualifying Brophy from receiving unemployment benefits solely because she received earnings from her son. That section excludes wages paid to a parent by the parent's child in determining qualifying base year wages.

Brophy filed for unemployment benefits on April 1, 2001 with a base year for wage consideration of all four quarters of 2000. Brophy worked for Liberty Mutual during the first two quarters and earned $5,620 and $10,561, respectively. These wages were included in the calculations for determining Brophy's eligibility for unemployment benefits. Brophy next worked part-time for Frengel Painting, a sole proprietorship owned by her son, as a bookkeeper and earned $864 in the third quarter and $1,248 in the fourth quarter. Brophy was separated from her employment with Frengel Painting due to the lack of available work. The Referee did not include these wages in the calculations for determining whether Brophy qualified for unemployment benefits because they represented earnings from employment with her son that was specifically excluded under Section 4(l)(4)(5). The Referee found that under Section 404(e), Brophy's total base year wages of $16,182 fell short of the total qualifying base year wage requirement of $16,880. Brophy's eligibility was then considered under Section 404(a)(3), and she was disqualified under that section as well

because she did not meet the total base year wages of $16,760. Therefore, she was found financially ineligible for benefits under Sections 401(a) and 404, which the Board affirmed.[2]

Section 401(a) provides that compensation shall be payable to any employee who is or becomes unemployed, and who had, within the base year, been paid wages for employment as required by Section 401(c), which essentially provides criteria for the determination of a claimant's financial eligibility in accordance with the table set forth in Section 401(e). Also Section 404(a)(3) permits consideration of eligibility for unemployment benefits when wages are insufficient to qualify under Section 404(e) but may qualify for any one of the next three lower benefits rates. Finally, Section 4(l)(4)(5) provides that "[t]he word 'employment' shall not include – [s]ervice performed by an individual in the employ of [her] son, daughter, or spouse, and service performed by a child under the age of eighteen (18) in the employ of his father or mother."

---

[2] The Court's review is limited to determining whether constitutional rights have been violated, whether an error of law was committed or whether necessary findings of fact are supported by substantial evidence. *Rosler v. Unemployment Compensation Board of Review*, 542 A.2d 624 (Pa. Cmwlth. 1988). When reviewing the constitutionality of a law, the Court must consider the policy and legislative intent behind the enactment of that law. *Id.* Moreover, the Court has held consistently that every presumption must be indulged in favor of the constitutionality of a statute, with a heavy burden falling to the claimant who sought to challenge that statute. *Gilman v. Unemployment Compensation Board of Review*, 369 A.2d 895 (Pa. Cmwlth. 1977).

Brophy challenges the constitutionality of Section 4(*l*)(4)(5) of the Law. She cites *Babb v. Unemployment Compensation Board of Review*, 616 A.2d 736 (Pa. Cmwlth. 1992), to support her incorrect notion that the constitutionality of Section 4(*l*)(4)(5) has never been ruled upon by the Court and that her case is one of first impression. Brophy notes, however, that in *Babb* the Court found that the statute was unambiguous. Citing *Renne v. Unemployment Compensation Board of Review*, 499 Pa. 299, 453 A.2d 318 (1982), Brophy contends that the provisions outlining eligibility for unemployment benefits are remedial and therefore should be construed liberally so as to allow a broader base of qualifiers for benefits. Brophy argues that the only persons who should be denied benefits are those who were separated from employment due to "fraud, perjury, substance abuse, arrest, conviction, incarceration, fault, refusal of work, and other similar action," *see* Brophy Brief at 8, and since she did not commit any of this behavior there was no rational basis for denying her unemployment benefits. In addition, Brophy maintains that Section 4(*l*)(4)(5) unjustly assumes the existence of a *de facto* fraud when a mother works for her child.

The Board counters that Section 4(*l*)(4)(5) of the Law bears a rational relationship to a legitimate state interest and that the constitutionality of this section was previously determined in *Bievenour v. Unemployment Compensation Board of Review*, 401 A.2d 594 (Pa. Cmwlth. 1979). The Board notes the Court's reasoning in *Bievenour* that a great potential for fraud exists when parents are

employed by their sons or daughters, supporting a legitimate state interest in the statutory enactment. *See also Martin v. Unemployment Compensation Board of Review*, 502 Pa. 282, 466 A.2d 107 (1983) (rational relationship test applies in constitutional challenges to unemployment compensation laws, which carry a presumption of rationality only overcome by a clear showing of arbitrariness and irrationality); *Kroh v. Unemployment Compensation Board of Review*, 711 A.2d 1093, 1095 (Pa. Cmwlth. 1998) (constitutional safeguards are offended only when a classification rests on wholly irrelevant grounds to achieve a state objective).

The Court rejects Brophy's argument that her constitutional rights were denied because she was classified as a "parent," which resulted in the denial of unemployment benefits. A classification that is not inherently suspect will be upheld if it has some reasonable basis; suspect classifications are those which are based upon a protected class such as race, creed, color or national origin. *Thomas v. Unemployment Compensation Board of Reivew*, 577 A.2d 940 (Pa. Cmwlth. 1990). Thus the class of people who are employed by their children or spouses is not protected. In *Bievenour* the Court recognized that where state law defines eligibility for statutory entitlement, such eligibility is subject to Fourteenth Amendment protection and may not be limited to unlawfully discriminate or to cause a denial of due process.

In responding to the constitutional challenge to Section 4(*l*)(4)(5) in *Bievenour*, the Court held as follows:

> [T]he objective of the classification which excludes parents of employers is rationally related to a legitimate state interest. ...The computation of benefits without a formal arrangement, combined with the great potential for fraudulent abuse, presents obvious problems.
>
> It cannot be persuasively argued that a compensation program encompassing parents of employers would not be more costly than the existing program and thus would inevitable require state subsidy, a higher rate of employer contribution, a lower current benefit scale, or a combination of them. We perceive nothing in the Constitution which requires a state to subordinate or compromise its legitimate interests solely for the purpose of expanding unemployment assistance programs.
>
> A state has a legitimate interest in maintaining a self-supporting compensation program.

Id. at 595. Brophy asserts that *Bievenour* does not apply to her case because of the factual distinctions between the two, i.e., she received regular earnings from her son and performed services necessary to the operation of his business. These factual distinctions, however, are insufficient to defeat the fundamental holding in *Bievenour* that Section 4(*l*)(4)(5) is rationally related to a legitimate state interest.

The holding therefore is binding on this Court, and it now affirms the Board.

s/_____

DORIS A. SMITH-RIBNER, Judge

PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW REFEREE'S DECISION

Decision Mailing Date	**S.S.Acct.No.**
July 11, 2001	185-30-7780
Appeal No.	**Appeal Date**
01-07-I-0212	May 17, 2001

Concerning the claim of: Employer

Beverly Brophy
R.D. #5, Box 299
New Castle, PA 16105

Frengel Painting
R.D. #3, Box 417
New Castle, PA16105

Date and Nature of Determination Being Appealed

05/07/01 – Claimant Financially Ineligible under Section 404 of the Law

Hearing Date and Location

July 10, 2001 – New Castle, PA

Date of Application of Benefits

04/01/01

Hearing Appearances:

Claimant

Representative of Claimant Office

Employer – n/a

FINDINGS OF FACT:

1. For the purpose of this appeal, the claimant was last employed by Frengel Painting where she performed the job duties of bookkeeper at a final rate of pay of $8 per hour. The claimant began his employment at an undetermined date in July 2000 and her last day of work was on an undetermined date in December 2000.

2. The claimant was a part-time employee with Frengel Painting, working an average of 12 hours per week.

3. The claimant was separated from employment in December 2000 due to work being slow.

4. The claimant's separation from employment is not at issue at this appeal hearing.

5. Frengel Painting is owned solely by the claimant's son.

6. The claimant filed an application for unemployment compensation benefits with an effective date of April 1, 2001 thereby establishing a base year period consisting of the first quarter 2000, second quarter of 2000, third quarter of 2000 and fourth quarter of 2000.

7. On May 7, 2001, the Bureau of Unemployment Compensation Benefits and allowances issued a Revised Notice of

8. Financial Determination which revealed the claimant had the following base year employment and wages:

QUARTERS

Employer	Liberty Mutual
1st 2000	$5,620
2nd 2000	$10,561
3rd 2000	0
4th 2000	0
Total Wages	$16,182

9. The claimant had high quarter wages of $10,561 and total base year wages of $16,282.

10. During the third quarter of 2000, the claimant worked for Frengel Painting and had total gross earnings of $864.

11. During the fourth quarter of 2000, the claimant worked for Frengel Painting and had total gross earnings of $1,248.

12. The sums received by the claimant form Frengel Painting were not included by the compensation authorities in the claimant's base year wages for the purposes of determining financial eligibility for benefits.

ISSUE: At issue in this appeal is whether the sums received by the claimant from Frengel Painting should be included in the claimant's base year wages for purposes of determining financial eligibility for benefits.

REASONING: On May 7, 2001, the compensation authorities issued a Revised Notice of Financial Determination finding the claimant financially not eligible for benefits under the provisions of Sections 401(a) and 404 of the Pennsylvania Unemployment Compensation Law. To the determination, the claimant filed a timely appeal.

Section 401(a) of the Law provides that compensation shall be payable to any employee who is or becomes unemployed and who has within her base year period been paid wages for employment as required by Section 404(c) of the Pennsylvania Unemployment Compensation Law.

Section 404(c) of the Law provides that compensation shall be payable to any employee who is or becomes unemployed and who has within her base year been paid wages for employment as required by Section 404(e) of the Law.

Section 404(e) of the Law provides that a claimant who had quarterly base year wages amount to at least $10,561 can qualify for benefits provided that her total base year wages amount to at least $16,880.

In the instant case, the claimant's total base year wages amount to $16,182 which falls short of the qualifying amount and, therefore, the

claimant is ineligible to receive benefits under this Section of Law.

Section 404(a)(3) of the Law provides that a claimant who has insufficient wages to qualify under Section 404(e) may still qualify for benefits if her base year wages qualify her for any one of the next three lower benefit rates. The lowest benefit rate using this step-down method requires total base year wages of $16,760.

Since the claimant's wages still fall short of the required amount, she does not qualify financially for benefits under Section 404(a)(3) of the Law.

The claimant contends that her wages earned with Frengel Painting should be included in her base year wages to qualify her financially for unemployment compensation benefits. In this case, it is undisputed that during the third quarter of 2000 and fourth quarter of 2000, the claimant was employed by Frengel Painting earning $864 in the third quarter of 2000 and $1,248 in the fourth quarter of 2000. However, Section 4(x) of the Pennsylvania Unemployment Compensation Law provides, in pertinent part, that wages means all remuneration paid by an employer to an individual with respect to employment.

Section 4(1) (4) (5) of the Law provides, in part and substance, that covered employment under the Pennsylvania Unemployment Compensation

Law shall not include services performed by an individual in the employ of a son, daughter or spouse and service performed by a child under the age of 18 in the employ of his father or mother.

Since the claimant in her service for Frengel Painting under the circumstances here present was not engaged in covered employment under the law, the sums which received for or in connection with that service do not constitute wages under Section 4(x) of the Law and were properly excluded from the determination of the claimant's financial eligibility for benefits.

Under Sections 401 and 404 of the Law, the claimant has insufficient qualifying base year wages. Therefore, the Financial Determination issued by the compensation authorities must be affirmed.

ORDER: The determination of the compensation authorities is affirmed. The claimant is financially not eligible for benefits.

John R.

Cross, Referee

mls

cc: Daniel Herman, Esquire
2100 Wilmington Road
New Castle, PA 16105

Hamilton Farrar
BETO – F A S
2103 Ninth Avenue
Beaver Falls, PA 15010

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW
LABOR AND INDUSTRY BUILDING
HARRISBURG, PENNSYLVANIA 17121

DECISION AND ORDER

APPEAL NO.	**S.S. ACCT. NO.**
B-01-07-I-0212	185-30-7780

DECISION NO.	**ORDER MAILING DATE**
B-395161	**August 23, 2001**

CONCERNING THE CLAIM OF:

BEVERLY A. BROPHY
R.R. #5 BOX 299
NEW CASTLE PA 16105

EMPLOYER:

FRENGEL PAINTING
RR #3 BOX 417
NEW CASTLE PA
16105

DATE AND NATURE OF REFEREE'S DECISION

July 11, 2001: The determination of the Department is affirmed. The claimant is Financially not eligible for benefits.

FINDINGS OF FACT:

1. The claimant filed an application for benefits with an effective date of April 1, 2001, thereby establishing a base year consisting of the first, second, third, and fourth quarters of 2000.

2. Claimant, during her base year, earned the following wages:

	Employer	Amount
First Qtr. 2000	Liberty Mutual	$5620.00
Second Qtr. 2000	Liberty Mutual	$10,561.00
Third Qtr. 2000		$0
Fourth Qtr. 2000		$0

3. The claimant had a high quarter of $10,561.00 and total base year wages of $16,182.00.

4. During the third and fourth quarters of 2000, the claimant did perform services for Frengel Painting as a bookkeeper, working 12 hours per week at a rate of $8.00 per hour.

5. The claimant performed services for Frengel Painting until the end of December 200, at which time she was separated due to a lack of available work.

6. Frengel Painting is owned by the claimant's son, who is the sole proprietor.

7. During the third quarter of 2000, the claimant had earnings of $864.00 as a result of services performed for Frengel Painting.

8. During the fourth quarter of 2000, the claimant had earnings of $1248.00 as a result of services performed for Frengel Painting.

DISCUSSION: The Department issued a determination denied benefits to the claimant. The claimant filed an appeal therefrom, and following a hearing at which the claimant, with counsel and an agency representative appeared and testified, the Referee issued a decision affirmed the Department's determination. Thereafter, the claimant filed a further appeal from the Referee's decision.

Section 401(a) provides that compensation shall be payable to any employee who is or becomes unemployed and who has, within her base year, been paid wages for employment as required by Section 404(c) of the Law.

Section 404(c) provides, in effect, for the determination of claimant's financial eligibility in accordance with the table set forth in Section 404(e). Section 404(e) of the Law provides that a claimant whose highest quarterly base year wages amount to at least $10,538 can qualify for benefits provided her total base year wages

amount to at least $16,880. In the instant case, the claimant's total base year wages amount to $16,182, which falls short of the qualifying amount and, therefore, the claimant ineligible to receive benefits under this Section of the Law.

Section 404(a)(3) of the Law further provides that a claimant who has insufficient wages to qualify under the provisions of Section 404(e), may qualify for benefits if her base year wages her for any one of the next three weekly benefit rates. Since the third lower weekly benefit rate of $421 requires total base year wages of $16,760, and the claimant's total base year wages are less than this amount, she must be ruled financially ineligible for benefits under the provisions of Section 404(a)(3) of the Law.

Although the claimant had additional earnings from her employment with Frengel Painting, those earnings are not "wages" within the meaning of the Law. Section 4(l)(4)(5) specifically excludes services performed in the employ of an individual's son, daughter, or spouse from the definition of "employment." The claimant's earnings from Frengel Painting were therefore earned in non-covered employment and cannot be used to determine her eligibility for unemployment compensation.

The Board notes that the claimant has challenged the constitutionality of Section 4(l)(4)(5). The Board finds this section of the law is no unconstitutional.

CONCLUSION OF LAW: The claimant is financially ineligible for benefits under the provisions of Section 401 and Section 404 of the Pennsylvania Unemployment Compensation law.

ORDER: The decision of the Referee is affirmed and benefits are denied.

UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW

William A. Hawkins, Chairman

Peter J. Kramer, Member

Robert J. Ewanco, Member

NOTICE: You have the right to file an appeal to the Commonwealth Court within 30 days after the mailing date of this Decision and Order. For more information, please read the enclosed blue card.

Supreme Court, U.S.
FILED
JAN 29 2003

No. 02-979

IN THE
Supreme Court of the United States

BEVERLY A. BROPHY,
Petitioner,

v.

PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

LESLIE ANNE MILLER
General Counsel
Commonwealth of Pennsylvania

K. SCOTT ROY
Deputy General Counsel
(Counsel of Record)

ROGER H. CAFFIER
Chief Counsel

KELLY K. SMITH
Assistant Counsel

Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101-2210
Telephone: (717) 783-6563
Counsel for Respondent

Dated: January 28, 2003

ST IVES BURRUPS/APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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QUESTION PRESENTED FOR REVIEW

Did the Pennsylvania Commonwealth Court properly decide that Section 4(*l*)(4)(5) of the Pennsylvania Unemployment Compensation Law, which excludes wages earned in the employ of a son or daughter when determining eligibility for unemployment compensation benefits, does not violate equal protection?

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STATEMENT OF THE CASE

This matter involves the denial of unemployment compensation benefits by the Pennsylvania Unemployment Compensation Board of Review (Board) to Beverly A. Brophy (Claimant) because of her financial ineligibility under the Pennsylvania Unemployment Compensation Law.[1]

Claimant filed an application for benefits and established a "base year" consisting of the four calendar quarters of 2000. (App. at 16a to Petition for Writ of Certiorari (Petition)).[2] Under Pennsylvania's Unemployment Compensation Law, a claimant is paid benefits based upon wages earned during their "base year," which consists of the first four of the last five completed calendar quarters prior to their application for benefits.[3] These wages must be earned in "employment" as defined by Section 4(*l*) of the Law.[4] During the first and second quarters of 2000, Claimant was employed by Liberty Mutual and earned wages that were included in her base year for purposes of establishing her eligibility for unemployment compensation benefits. (App. at 16a). During the third and fourth quarters of 2000, Claimant performed services only for a sole proprietorship owned by her son, Frengel Painting. (App. at 16a-17a).

The Board determined Claimant was financially ineligible for unemployment compensation benefits under Sections 401 and 404 of the Pennsylvania Unemployment Compensation Law (Law)[5] on August 23, 2001. (App. at 15a-19a). It found that Claimant's wages from Frengel Painting could not be included in her base year because they were not earned in "employment" under Section 4(*l*)(4)(5) of the

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1. Act of December 5, 1936, Sec. Ex. Sess. P.L. 2897 (1937), *as amended*, PA. STAT. ANN. tit. 43 §§ 751-914 (West 1991, 1992 & Supp. 2002).

2. Claimant's Appendix will be cited as (App. at ___a).

3. See PA. STAT. ANN. tit. 43 §§ 753(a), 801 (West 1991, 1992 & Supp. 2002).

4. PA. STAT. ANN. tit. 43 § 753(*l*) (West 1992 & Supp. 2002).

5. PA. STAT. ANN. tit 43 §§ 801, 804 (West 1991 & Supp. 2002).

Law.[6] (App. at 15a-19a). Consequently, Claimant was financially ineligible for benefits because she did not have sufficient base year wages to qualify under Section 404 of the Law.

Claimant appealed to the Pennsylvania Commonwealth Court, and asserted that Section 4(*l*)(4)(5) of the Law violates her right to equal protection under both the Pennsylvania and United States Constitutions. The Commonwealth Court affirmed the Board in an unreported opinion on March 8, 2002. The court held that Section 4(*l*)(4)(5) is rationally related to a legitimate state interest. (App. at 2a-8a). *Brophy v. Unemployment Compensation Bd. of Review*, No. 2212 C.D. 2001 (Pa. Cmwlth. Mar. 8, 2002). Claimant then sought discretionary review in the Pennsylvania Supreme Court, which denied Claimant's Petition for Allowance of Appeal. *Brophy v. Unemployment Compensation Bd. of Review*, 808 A.2d 573 (Pa. 2002). (App. at 1a).

REASONS FOR DENYING THE WRIT

THE PENNSYLVANIA COMMONWEALTH COURT PROPERLY DECIDED THAT SECTION 4(*l*)(4)(5) OF THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION LAW, WHICH EXCLUDES WAGES EARNED IN THE EMPLOY OF A SON OR DAUGHTER WHEN DETERMINING ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION BENEFITS, DOES NOT VIOLATE EQUAL PROTECTION.

The Petition for Writ of Certiorari does not merit the Court's review for two reasons. First, the Pennsylvania Commonwealth Court's decision is consistent with this

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6. PA. STAT. ANN. tit. 43 § 753(*l*)(4)(5) (West 1992 & Supp. 2002). This Section provides that the word "employment" shall not include –

> Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age eighteen (18) in the employ of his father or mother.

Court's equal protection analysis in unemployment compensation cases. Second, Claimant has not demonstrated any conflict between the decision below and decisions by the courts of appeal or state courts of last resort.

1. The appropriate standard of review to apply to constitutional challenges to state unemployment compensation laws is whether the challenged provision bears a rational relationship to a legitimate state interest. *Ohio Bureau of Employment Servs. v. Hodory,* 431 U.S. 471 (1975); *Idaho Dep't of Employment v. Smith,* 434 U.S. 100 (1977). "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. Such action by a legislature is presumed to be valid." *Hodory,* 431 U.S. at 489 *citing Dandridge v. Williams,* 397 U.S. 471 (1970). When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. *City of New Orleans v. Dukes,* 427 U.S. 297 (1976). Such legislation carries with it a strong presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59 (1978). In *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495 (1936), this Court rejected a 14th Amendment challenge to a state unemployment tax statute that exempted family businesses.

The Pennsylvania Commonwealth Court's opinion reflects a proper application of well-settled law. Further, Claimant's assertion that Section 4(*l*)(4)(5) of Pennsylvania's Unemployment Compensation Law violates her right to equal protection ignores the legitimate state interest in preventing fraud and collusion, which assists the state in maintaining a self-supporting unemployment compensation system. Both Congress and this Court have recognized that

the states have broad authority to implement and administer unemployment compensation programs. *New York Tel. Co. v. New York State Dep't of Labor,* 440 U.S. 519 (1979).

The constitutionality of Section 4(*l*)(4)(5) of Pennsylvania's Unemployment Compensation Law was properly upheld by the Pennsylvania Commonwealth Court in this case, based on its earlier decision in *Bievenour v. Unemployment Compensation Board of Review,* 401 A.2d 594 (Pa. Cmwlth. 1979). In *Bievenour,* the Commonwealth Court recognized that the entitlement to unemployment compensation was not a fundamental right and classification by age was not a suspect classification. This classification would be upheld if it was based upon a reasonable basis. *Bievenour,* 401 A.2d at 619, *citing Dandridge, supra.* The Commonwealth Court found that Section 4(*l*)(4)(5) bears a rational relationship to the legitimate government interest in preventing fraud and that this prohibition "made good sense." *Id.*

Like the appellee in *Hodory,* Claimant "in effect urges that the Court consider only the needs of the employee seeking compensation," *Hodory,* 431 U.S. at 490, when she concentrates on the effect of the statute on her individual unemployment claim. This Court succinctly observed that "[t]he rationality of this treatment is, of course, independent of any 'innocence' of the workers collecting compensation." 431 U.S. at 491. This Court also recognized that state legislatures do not offend the Constitution when they exercise their expertise in designing effective unemployment compensation systems. *Id. citing Dandridge.*

Claimant asserts, without citing any authority, that the statute cannot be rationally related to a legitimate state purposes because, in her opinion, the statute is "easily thwarted" by incorporating a business. The Board disagrees that the process of incorporating a business "easily" thwarts the purpose of the statute, or that possible circumvention necessarily renders the statute unconstitutional. This Court has recognized that it is "by practical experience and not by

theoretical inconsistencies" that equal protection questions be reviewed and that there is no requirement that "all evils of the same genus be eradicated." *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 110 (1949).

Claimant has not demonstrated, or even alleged, that Pennsylvania's Commonwealth Court's decision conflicts with any relevant decision of this Court. Claimant's only attempt to demonstrate a conflict is by citing a provision in the New York unemployment law that does not exclude the wages here in question. She neglects to point out, however, that New York is perhaps the *only* state that does not exclude wages earned in the employ of one's son or daughter for unemployment compensation purposes. *See* H.R. Rep No. 755, 94th Cong., 1st Sess. at 22 (1975) (All states exclude service for an employer by his spouse or minor child and, except in New York, service of an individual in the employ of his son or daughter).

It is clear that the exclusion of family employment contained in the Pennsylvania Unemployment Compensation Law bears a rational relationship to a legitimate government interest in preventing fraud and collusion. Therefore, that provision does not violate the Fourteenth Amendment to the United States Constitution. Accordingly, the Pennsylvania Commonwealth Court correctly affirmed the Board's decision finding Claimant financially ineligible for unemployment compensation benefits.

2. Pennsylvania is not unique in excluding wages earned in the employ of a son or daughter when determining eligibility for government benefits, as mentioned above. *See* H.R. Rep. No. 755, 94th Cong., 1st Sess. at 22 (1975). Claimant fails to demonstrate any conflict between the decision below and decisions from either federal appellate courts or state courts of last resort.

Section 4(*l*)(4)(5) parallels a provision in the definition of "employment" in the Federal Unemployment Tax Act. 26 U.S.C.A. § 3306(c)(5) (FUTA). The Social Security Act

contains a similar exclusion. 42 U.S.C.A. § 410(a)(3)(B). In creating this exemption, Congress recognized the potential for fraud and collusion when a child employs a parent. The House Report accompanying the Social Security Act pertinently acknowledged the reason for this exclusion:

> This exclusion [service performed by an individual employed by his son, daughter or spouse, and service performed by a child under age 21 in the employ of his parent] is already contained in the Federal unemployment tax provisions of the existing law and is considered advisable because of the possibility offered by such employment for collusion in building up credits in certain cases which offer a high return for a small amount of contributions.

H.R.Rep. No. 728, 76th Cong., 1st Sess. at 46 (1939).

The Eleventh Circuit Court of Appeals rejected an identical argument to Claimant's in the context of the Social Security Act's exclusion of family employment. In upholding this exclusion, the court, pointed out:

> [T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individualized determinations justified the inherent imprecision of a prophylactic rule.

Cornelius v. Sullivan, 936 F.2d 1143, 1149 (11th Cir. 1991), *quoting Weinberger v. Salfi,* 422 U.S. 749 (1975). The Commonwealth Court's decision in this case fully comports with *Cornelius*. In contrast, Claimant does not offer any decisions of federal appellate courts or state courts of last resort that conflict with *Cornelius*. Accordingly, further review by this Court is not warranted.

CONCLUSION

For the foregoing reasons, the Pennsylvania Unemployment Compensation Board of Review respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LESLIE ANNE MILLER
General Counsel
Commonwealth of Pennsylvania

K. SCOTT ROY
Deputy General Counsel
(*Counsel of Record*)

ROGER H. CAFFIER
Chief Counsel

KELLY K. SMITH
Assistant Counsel

Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101-2210
Telephone: (717) 783-6563
Counsel for Respondent